

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Saeed M.S. HADWARI Z-1150403

DECISION OR THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2250

Saeed M.S. HADWARI

This appeal was taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 25 April 1978, an Administrative Law Judge of the United States Coast Guard at New York, New York, after a hearing on several dates between 21 March and 6 April 1978, suspended. Appellant's document for a period of three months on probation of twelve months upon finding him guilty of misconduct. The two specifications of the charge of misconduct found proved allege (1) that Appellant, while serving as ordinary seaman aboard SS AMERICAN AQUARIUS, under authority of the captioned document, did, on or about 22 January 1978, while said vessel was in the foreign port of Yokohoma, Japan, wrongfully fails to obey a lawful order of the Third Officer, to wit, go below; (2) that Appellant, while serving as aforesaid, did, on or about 22 January 1978, while said vessel was leaving the foreign port of Yokohoma, Japan, wrongfully direct obscene and abusive language at the Chief Officer.

At the hearings Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specifications.

The Investigating Officer introduced into evidence the testimony of two witnesses and four documents.

Appellant testified in his own defense.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specifications as alleged had been proved. He then entered an order of suspension for a period of three months on probation for a period of twelve months.

The decision was served on 8 May 1978. Appeal was timely filed on 19 May 1978, and perfected on 25 June 1979.

FINDINGS OF FACT

On 22 January 1978, Appellant was serving under the authority of his document as ordinary seaman aboard SS AMERICAN AQUARIUS. Because of the disposition of this appeal, additional findings are unnecessary.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that the charges are not supported by evidence of a reliable and probative character, and that an official logbook entry was admitted improperly into evidence.

APPEARANCE: Phillips and Cappiello, New York, New York, by Sidney H. Kalban, Esq.

OPINION

I am constrained to reject much of the testimony relied upon by the Administrative Law Judge, and, having done so, to vacate his decision. I take this action only in light of the omneity of circumstances present within this case.

The substantive evidence presented by the Coast Guard Investigating Officer consisted of the sworn testimony of the Chief Mate and the Third Mate aboard SS AMERICAN AQUARIUS, and an entry from the vessel's official logbook. Appellant's only evidence in defense was his own testimony under oath.

The account of each of the three testified conflicts in many particulars with that of each of the other two. Nevertheless, the Administrative Law Judge, by accepting portions of the testimony of each, and rejecting other portions of that same testimony, was able to meld the accepted portions into a single version of the incidents which led to the Appellant's having been charged with misconduct. Normally, I should accept the Administrative Law Judge's determination as to the credibility of the witnesses who appeared personally before him, even where he has found them to be truthful only in part. Decision on Appeal No. 1391. The Administrative Law Judge's determinations of credibility "will be upheld absent a demonstration that they are arbitrary and capricious." Decision on Appeal No. 2097. Here, I am forced to conclude that his determinations on credibility do fall within the category of being "arbitrary and capricious."

The following iteration will serve to illustrate my misgivings as to the soundness of the determinations of credibility made by the Administrative Law Judge.

- a. Appellant testified that a meeting occurred in December of

1977, at which Appellant, the Master, and the Chief Mate were all present. The subject of Appellant's bad back and its effect on his fitness for duty was discussed. The Chief Mate unequivocally testified that he did not attend any such meeting. The Administrative Law Judge, however, accepted Appellant's testimony and found that the meeting had occurred.

b. The Chief Mate testified that, when Appellant arrived at the dock where SS AMERICAN AQUARIUS was moored on 22 January 1978, he had to order the ship's brow lowered to permit Appellant to board. Appellant testified that he simply boarded without difficulty because the brow had not been raised. The Third Mate testified that he thought the brow still was down when Appellant arrived. The Administrative Law Judge did not find that the brow had to be lowered for Appellant.

c. The Chief Mate testified that he formed an opinion, that Appellant was drunk and should not be allowed to go to his undocking station, as Appellant was walking up the brow. He further testified that he then ordered the Third Mate not to let Appellant turn to. The Third Mate testified that the Chief Mate gave him no such order before he, the Third Mate, left the gangway to report to his undocking station. The Administrative Law Judge accepted the testimony of the Chief Mate but not that of the Third Mate.

d. Appellant testified that he had not been drinking before arriving at the dock. The Administrative Law Judge believed Appellant and dismissed a specification charging Appellant with being intoxicated and unable to perform his assigned duties.

e. The Chief Mate testified that he ordered Appellant to go below and not to report to his undocking station. Appellant testified that no one spoke to him as he came aboard. The Administrative Law Judge did not find that Appellant had been ordered below by the Chief Mate.

f. The Third Mate testified that when Appellant did come to his undocking station, he ordered Appellant below. Appellant testified that the Third Mate gave no such order, but, instead, immediately began to push Appellant, telling him to "go back." The Administrative Law Judge accepted the Third Mate's testimony about this, and rejected Appellant's.

g. The Third Mate testified that he never touched Appellant. The Administrative Law Judge rejected the Third Mate's testimony and found that the Third Mate had pushed Appellant

on his chest "a few times."

h. The Third Mate testified that he had a flashlight in his left hand and a walkie-talkie in his right. Appellant testified that there was nothing in the Third Mate's left hand. The Administrative Law Judge accepted Appellant's testimony and did not find that the Third Mate was carrying a flashlight.

i. The Third Mate testified that after ordering Appellant several times to go below, he, the Third Mate, simply turned away from him but continued to push him. The Administrative Law Judge accepted the Third Mate's testimony about this, and rejected Appellant's

j. The Third Mate testified that Appellant struck him in the back. Appellant testified that he had not. The Administrative Law Judge found that Appellant had indeed struck the Third Mate.

k. The Third Mate testified that, as he walked away from Appellant, he slipped on a stopper on the deck, and stumbled forward to the deck. Appellant testified that on the last push administered by the Third Mate, the Third Mate pushed so hard that he caused himself to fall backward. The Administrative Law Judge accepted the Third Mate's testimony and found that the Third Mate had slipped on a stopper after being struck by Appellant.

l. The Chief Mate testified that when he came to the undocking station, he found the Third Mate and Appellant standing and confronting each other. The Third Mate testified that he was in the midst of arising, without assistance, after the stumble. Appellant testified that when the Chief Mate arrived, the Third Mate was still on the deck and that the former helped the latter to his feet. The Administrative Law Judge accepted only Appellant's testimony about this.

m. The Chief Mate and the Third Mate testified that Appellant had directed foul and abusive language first toward the Third Mate, and then toward the Chief Mate. Appellant testified that he had not. The Administrative Law Judge found that Appellant had directed such language toward the two officers.

n. Appellant testified that the Chief Mate had followed him and pushed him, saying "keep going, keep going, go to your room." The Chief Mate testified that he had not even followed Appellant from the undocking station. The Administrative Law Judge accepted the Chief Mate's testimony about this, and

rejected Appellant's.

o. The Chief Mate testified that several minutes later on the main deck, Appellant had threatened him. Appellant testified that not only did he not threaten the Chief Mate, but the Chief Mate had grabbed his arm and, after again telling him to "go to his room," had threatened to have Appellant's seaman's papers taken. The Administrative Law Judge accepted the Chief Mate's testimony about this, and rejected Appellant's.

The Administrative Law Judge determined that the only other substantive evidence, the logbook entry, had not been prepared in substantial compliance with 46 USC 702. Nevertheless, pursuant to 46 CFR 5.20-107, he properly admitted it into evidence. Decision On Appeal No. 2145. This log entry, apparently based upon statements made by the Chief Mate and the Third Mate to the Master, is in accord with much of the testimony found not credible by the Administrative Law Judge. Hence, of necessity, the Administrative Law Judge must have rejected substantial portions of the entry in making his findings of fact. Having reviewed this logbook entry myself, I am unable to conclude that it adds sufficient weight to the case against Appellant to overcome the deficiencies in the evidence which I already have addressed.

Thus, from three highly conflicting versions of the same incident, the Administrative Law Judge has managed to weave a single account of the facts. However, in so doing, the Administrative Law Judge has been forced to rely almost exclusively upon the testimony of three men whose testimony, for the most part, he was unable to accept. This difficulty might have been alleviated had the Coast Guard Investigation Officer called as witness the Master and at least one of the seamen who were present at Appellant's undocking station when the incident occurred. The Master presumably could have corroborated the testimony of either the Chief Mate, or Appellant, about the alleged meeting in December of 1977. It also appears that at least one, and perhaps two, of the seamen assigned to Appellant's undocking station, had occasion to observe the alleged incident. Each presumably could have corroborated the testimony of either the Third Mate or Appellant as to what actually had happened that morning. Inexplicably, the Investigating Officer called only those who actively were involved in the alleged incident, apparently choosing not to present any testimony from these non-participants who presumably would have been less interested in the outcome.

In light of all these circumstances, I conclude that misconduct was not proved by substantial evidence of a reliable and probative character.

ORDER

The order of the Administrative Law Judge, dated at New York, New York, on 25 April 1978, is VACATED, the findings SET ASIDE, and the charge DISMISSED.

R.H. SCARBOROUGH
Vice Admiral, U.S. Coast Guard

Vice Commandant

Signed at Washington, D.C., this 8th day of June 1981.

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Log entries

Administrative of although not prepared in substantial
compliance with 46 U.S.C.702
Probative value of, outweighed by contradicting testimony

Witnesses

ALJ's determinations of credibility rejected as arbitrary
and capricious